35081-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT
v.

TISHAWN WINBORN, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Whether the trial court erred in failing to question the juror?

2. Whether the trial court correctly admitted witness opinions?

II. SUMMARY

First, Mr. Winborne challenges the trial court's failure to strike a juror who witnessed some part of the events on one day. The State agrees that the trial judge erred by failing to inquire into the scope and impact that would have on the jury. However, that juror is not presumed to be biased or prejudiced against the defendant. Rather, the court was presented with evidence of a potential bias. Failing to inquire into that potential calls into question the fairness of the trial. Despite that error, the jury showed itself to be fair and impartial by their verdicts, acquitting Mr. Winborne on two charges, and convicting him on the two charges supported by overwhelming evidence.

Mr. Winborne next challenges the admission of certain testimony that he was driving recklessly or eluding. He filed a motion in limine seeking to exclude such testimony, but the court determined to reserve on the issue until the testimony was heard. Subsequently, Mr. Winborne did not object to any of the challenged evidence, and waived any further review.

III. STATEMENT OF THE CASE

On August 5, 2016, Officer Rodriguez was investigating a reported crime. RP 163. During that investigation, he watched a surveillance video of Tishawn Winborne at a Motel 6 loading boxes into a red car. RP 164-65. As Officer Rodriguez left the Motel 6, he saw Mr. Winborne walking down the street, and observed him get into the red vehicle. RP 167-68. Officer Rodriguez checked the license plate and confirmed that the car was reported stolen. RP 168. Officer Rodriguez followed Mr. Winborne in an undercover vehicle until a patrol car responded. RP 168. Officer Cole responded to the request and attempted to stop Mr. Winborne. RP 172, 192. Mr. Winborne immediately accelerated away from Officer Cole through a partially residential neighborhood. RP 172-73, 196. Mr. Winborne drove at about 45 miles per hour through the neighborhood with a speed limit of 25 miles per hour, while Officer Cole followed behind with his lights and siren activated. RP 196. Mr. Winborne slowed to about 30 miles per hour, and drove through stop signs and across arterials at Monroe and Post. RP 172, 197-98. During this chase, Mr. Winborne was less than two blocks ahead of Officer Cole. RP 201. After crossing Post, Officers Cole and Rodriguez discontinued their pursuit out of a concern for public safety. RP 173.

Later that day, Sergeant Vigesaa located the vehicle and placed a GPS unit on it. RP 243. The next day, Sergeant Vigesaa and a team of officers were parked at the intersection of Nine Mile Road and Seven Mile Road. RP 249. They were in that position monitoring the GPS device as it came toward them on Nine Mile Road. RP 249. After the car drove past, Sergeant Vigesaa pulled out behind it and activated his emergency lights. RP 251. At that time, the car was going 5 miles per hour over the 50 miles per hour speed limit. *Id.* Once the lights were activated, the car accelerated rapidly. *Id*. Sergeant Vigesaa activated his siren and all lights, and caught up to it while it was going 78 miles per hour. RP 253-54. At that point, he deployed a second GPS tracking system that attached to the car. RP 254. The police then backed off, and tracked the car as it accelerated up to 98 miles per hour. RP 259. The car continued onto Francis, slowing to around 80 miles per hour in a 35 miles per hour zone, with no police following him anymore. RP 259. Mr. Winborne continued to wind around through a series of side streets with 25 and 30 miles per hour speed limits, traveling around 60 miles per hour the entire time. RP 260-62. All of this occurred on a Sunday afternoon with moderate traffic in the area. RP 255-56.

Eventually, Mr. Winborne stopped and parked the car. RP 325. As he was getting out of the car, Sergeant Vigesaa arrived on foot and told Mr. Winborne to stop, identifying himself as police (he was also fully

uniformed). RP 266. Mr. Winborne proceeded to run up some stairs, followed by Sergeant Vigesaa. RP 266-67. Sergeant Vigesaa again identified himself as police and told him to stop. RP 267. Again Mr. Winborne turned to run before being detained by police. RP 267.

During the pursuit on August 6, Lieutenant Walker positioned his vehicle in the Shadle area near Rowan and Belt. RP 291. He was stopped on Belt in a police interceptor. RP 292. Officer Walker observed Mr. Winborne drive past and then moved to the area of Francis and Division. RP 293. He parked his vehicle on the northbound side of Colton in a 25 miles per hour zone. RP 295. While he was parked there, Mr. Winborne drove the car out of a parking lot and onto Colton. RP 297. He drove south in the northbound lane, and accelerated to a high speed. RP 297-8. He corrected onto the right side of the road, but then just prior to reaching the officer, swerved onto the left side and drove directly toward Lieutenant Walker. RP 299. At the last second, he corrected and narrowly avoided Lieutenant Walker's parked vehicle. RP 300.

After being detained, Mr. Winborne was asked about stealing the car, and responded "it doesn't matter; she knows better than to press charges." RP 338. When questioned about the pursuit, he said, "you guys just couldn't catch up. Who drives the Charger? He's slow." *Id*. The Charger was driven by Sergeant Vigesaa. *Id*.

Mr. Winborne was subsequently charged with theft of a motor vehicle, two counts of attempting to elude a police vehicle, one count of second degree assault, and one count of third degree assault. CP at 3-4. Following presentation of the State's case at trial, the court dismissed the charge of theft of a motor vehicle because there was not sufficient evidence that the theft occurred on or about July 22, as charged. RP 380-81. Subsequently, the jury convicted Mr. Winborne on both counts of attempting to elude, but acquitted him on the assault charges. RP 477.

IV. ARGUMENT

A. JUROR WITNESS

A trial court's ruling on a challenge to a juror is reviewed for an abuse of discretion. *State v. Gregory*, 158 Wn.2d 759, 814, 147 P.3d 1201 (2006). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A criminal defendant has constitutional rights to due process and an impartial jury. U.S. Const. Amends. VI, XIV; Wash. Const. Art. 1 § 22 . These include a right to have unbiased jurors, whose prior knowledge of the case or prejudice will not deprive the defendant of a fair trial. *See State v. Momah*, 167 Wn.2d 140, 152, 217 P.3d 321 (2009). Trial judges carry an obligation to ensure those rights by dismissing unfit jurors during trial. RCW 2.36.110; *see State v. Berniard*, 182 Wn. App. 106, 117,

327 P.3d 1290 (2014). Importantly, upon learning of a possible source of bias for a juror, the trial court must determine the circumstances, the impact on the juror, and whether it is prejudicial. *Oswald v. Bertrand*, 374 F.3d 475, 477-78 (7th Cir. 2004).

Mr. Winborne contends that because a juror witnessed some portion of the events, this Court should draw a "conclusive presumption of implied bias." He premises this argument on dicta taken out of context from a United States Supreme Court concurrence. In *Smith v. Phillips*, Justice O'Connor aptly suggests that there are certain, extreme situations where a juror should be considered inherently biased regardless of what they may say at a hearing. 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982) (O'Connor concurring). She posits several generalized situations where a juror's personal interest in the criminal transaction should put it beyond question that the juror is biased. *Id*. at 222. One of those is "that the juror was a witness or somehow involved in the criminal transaction." *Id*. However, the potential for bias stems from the personal interest in the matter. When such an interest exists, no representations to the contrary can establish that the juror is unbiased. However, these concerns are not implicated when the juror was a disinterested witness to some events that end up involved in a criminal trial.

This distinction is captured in Washington law governing the striking of jurors. Under CrR 6.4(c), a judge may strike a juror sua sponte when the judge is of the opinion that there are grounds for challenge. In the absence of such an action, a party may challenge a juror for cause. CrR 6.1(c)(2). Such a challenge may be general or particular. RCW 4.44.170. A particular challenge must assert that the juror has a defect, an implied bias or an actual bias. RCW 4.44.170. An implied bias must be premised on some relation to a party or an interest in the issues involved. RCW 4.44.180.

Here, a juror realized, after all of the evidence was presented, that she witnessed some part of the events giving rise to the crimes charged. The defense asked the court to remove the juror, asserting that a juror witness cannot be unbiased. In essence, this was a motion to strike that juror for cause based on an implied bias. However, simply witnessing events does not automatically render a juror inherently biased. There was no indication that the juror hid anything from the court, prejudged the matter, or was interested in the outcome in some way. Indeed, the juror witnessed such a tangential part of the crime that she did not even realize it until after all the evidence was presented. In all likelihood, she simply saw Mr. Winborne or a police officer drive past. There was nothing to establish an implied bias to support a challenge for cause. CrR 6.2(c)(2); RCW 4.44.180.

Having rejected that challenge, the trial judge went on to find that the jury instructions would adequately address any potential bias the juror may have. The real question now before this court is whether that decision was an abuse of discretion. There is a presumption that jurors will be faithful to their oath and follow the court's instructions. *State v. Moe*, 56 Wn.2d 111, 115, 351 P.2d 120 (1960). However, that presumption does not negate the court's duty to investigate a potential bias. The court must still determine whether a bias exists and if so whether it will prejudice either party. Here, the court was presented with a potential source of an actual bias: a juror witnessed some part of the events. By failing to make any inquiry, the court abandoned its obligation to ensure that the jury was fair and impartial. However, that error was harmless.

A conviction can withstand a constitutional error if the state can show beyond a reasonable doubt that the error was harmless. *State v. Coristine*, 177 Wn.2d 370, 379-80, 300 P.3d 400 (2013). Here, the jury was subjected to extensive voire dire and determined to be fair and impartial. RP 88-135. The parties and the court determined that the jurors selected would be able to set aside any preconceptions and judge the case based on the facts presented and the instructions from the court. The jury was then presented with overwhelming evidence to support the two charges of attempting to elude a pursuing police vehicle, and somewhat weaker

evidence to support the two counts of assault. After hearing all the evidence and argument, the jury convicted on the two counts of attempting to elude but acquitted on the two counts of assault. Despite the trial court's failure to assess the potential bias, the jury showed itself to be fair and unprejudiced by rendering carefully considered verdicts, well-supported by the evidence.

Mr. Winborne asserts that this error is structural, and cannot be harmless. However, even a cursory reading of the defendant's cited authorities belies that point. It is not the *potential* for bias, but the presence of an *actually* biased juror that cannot be harmless. *See State v. Irby*, 187 Wn. App. 183, 193, 347 P.3d 1103 (2015). Here, the record does not support a conclusion that the juror was biased, but merely that the juror was potentially biased. The trial court's failure to inquire into that potential bias was harmless, as shown by the verdicts of the jury, which established that they were unprejudiced.

As a final note, if this Court were to reverse the convictions, the verdicts of acquittal would ordinarily bar retrial on the two counts of assault. However, it would be disingenuous, at best, to argue that the jury was inherently biased and unfair in convicting him on two counts, but competent to render judgment when they acquitted him on the other two. When a criminal conviction is reversed on appeal, the defendant can be retried because he waived his double jeopardy protections by challenging the

conviction. *State v. Walters*, 146 Wn. App. 138, 147, 188 P.3d 540 (2008). By challenging the fundamental fairness of the jury, Mr. Winborne is asking this court to void their verdicts. Such a request should be deemed a waiver of his double jeopardy protections not just with regard to the two convictions, but also with regard to all of the decisions rendered by that jury.

B. OPINION TESTIMONY

Mr. Winborne next challenges the trial court's denial of his motion in limine to prohibit any witness from testifying that he drove "recklessly" or was "eluding" police. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *State v. Sexsmith*, 138 Wn. App. 497, 504, 157 P.3d 901 (2007). Again, discretion is abused when it is exercised on untenable grounds or for untenable reasons. *Junker*, 79 Wn.2d at 26.

Contrary to Mr. Winborne's assertions, a witness's opinion testimony is not inadmissible simply because it touches on an ultimate fact at issue. ER 704. That an opinion supports the conclusion that the defendant is guilty does not render it inadmissible, but rather is what makes it relevant in the first place. *State v. Wilber*, 55 Wn. App. 294, 298 n.1, 777 P.2d 36 (1989). The important question is whether the opinion has a proper

foundation in the witness's own observations and experience. *City of Seattle v. Heatley*, 70 Wn. App. 573, 580-81, 854 P.2d 658 (1993).

Here, Mr. Winborne challenges the denial of his pre-trial motion to prohibit any officer from testifying "on the ultimate issue." CP at 99. This motion sought to impose a blanket prohibition against any witness using the terms "reckless" or "eluding." *Id.* While it would have prevented any implicit statement of guilt, this motion was overbroad, and the trial court aptly *reserved* ruling on the issue. RP 52. The court stated that simply using those terms would not be inappropriate. *Id*. Indeed, those terms could easily be part of proper opinion testimony. The correct decision was the course taken: for the trial court to assess at trial whether particular testimony was appropriate.

Presumably, the court would have sustained an objection if testimony was no longer appropriate, but became a statement of guilt. However, Mr. Winborne failed to object to any of this testimony at trial. Without an objection at trial, evidentiary errors are not preserved for appeal. *State v. Powell*, 126 Wn.2d 244, 256, 893 P.2d 615 (1995). A motion in limine can preserve such an issue, but only the losing party is deemed to have a standing objection. *State v. Finch*, 137 Wn.2d 792, 819-820, 975 P.2d 967 (1999). When a court expresses some intent to address further objections at trial, a party is not deemed to have a standing objection. *Id*.

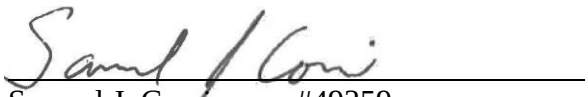
The trial court, here, *reserved* its ruling for trial. Mr. Winborne then did not object to any testimony that was covered by the motion.

V. CONCLUSION

While the court erred by not investigating the circumstances of the juror who witnessed some portion of the events, that error was harmless beyond a reasonable doubt. The jury showed itself to be fair and unprejudiced in the rendering of its verdicts. Then, by failing to object at trial, Mr. Winborne waived any further challenge to the admission of the officer opinion testimony.

Dated this 11th day of September, 2017,

LAWRENCE H. HASKELL
Prosecuting Attorney



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent, v. TISHAWN M. WINBORNE, Appellant.	NO. 35081-9-III CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on September 11, 2017, I e-mailed a copy of the Motion to Extend Time for Filing Response Brief in this matter, pursuant to the parties' agreement, to:

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SPOKANE COUNTY PROSECUTOR

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